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Supreme Court of the United States

(OCTOBER TERM, 1975)

No. 75-219

EDWARD L. DOWNEY,
Petitioner-Appellee,

vs.

E. P. PERINI, SUPERINTENDENT,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT-APPELLANT'S JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the court below, reversing the previous denial by the United States District Court for the Northern District of Ohio, Eastern Division, of an application for writ of habeas corpus is unreported. (Appendix page 13). The opinion of the district court also is unreported. (Appendix page 8).

JURISDICTION

On July 3, 1975, the court below entered judgment for petitioner-appellee, hereinafter appellee, and reversed the previous denial of his application for writ of habeas corpus. (Appendix page 13). In so doing, the court below voided not only the conviction in this particular case, but explicitly held unconstitutional on Eighth and Fourteenth Amendment grounds the former and present Ohio statutes relating to possession for sale

and sale of marijuana. Respondent-appellant, hereinafter appellant, duly filed a notice of appeal with the court below on July 14, 1975. Jurisdiction is invoked pursuant to 28 U.S.C. §1254 (2). See: *Dutton v. Evans,* 400 U.S. 74 (1970); *Fornaris v. Ridge Tool Co.,* 400 U.S. 41 (1970); *City of Chicago v. Atchison, Topeka and Santa Fe Ry. Co.,* 357 U.S. 77 (1958); *Watson v. Employees Liability Assurance Co.,* 348 U.S. 66 (1954), *rehearing denied,* 348 U.S. 921.

QUESTION PRESENTED

Whether the Ohio statutory penalties for possession for sale and sale of marijuana, [ten to twenty (10-20) and twenty to forty (20-40) years respectively], constitute cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments to the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

The statutes of the State of Ohio involved in this case are §§3719.44 (B) and (D) and §§3719.99 (D) and (F), Ohio Revised Code, as follows:

Section 3719.44 No person shall:

(B) possess for sale any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code, or conspire with another person or persons to violate section 3719.43, division (C) or (E) of section 3719.44, or section 3719.47 of the Revised Code;

(D) sell, barter, exchange, or give away, or make offer therefor, any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code.

Section 3719.99

(D) whoever violates division (A) or (H) of section 3719.20 or division (B) of section 3719.44 of the Revised Code shall be imprisoned not less than ten nor more than twenty years for a first offense; for a second offense such person shall be imprisoned not less than fifteen nor more than thirty years; for a third offense such person shall be imprisoned not less than twenty nor more than forty years.

(F) whoever violates division (B) of section 3719.20 or division (D) of section 3719.44 of the Revised Code shall be imprisoned not less than twenty nor more than forty years.

(Pages Ohio Revised Code, Title 37, Health, Safety, Morals).[1]

The statute of the United States involved in this case is 28 U.S.C. §1254 (2):

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

STATEMENT OF THE CASE

On October 13, 1973, and after exhaustion of available state remedies, appellee filed an application for

[1] Appellee was indicted and tried pursuant to former §§ 3719.20 (A) and (B), Ohio Revised Code. In the interim, the Ohio legislature changed the classification of marijuana from a narcotic to a hallucinogen, the present statutes being set forth above. Since such change did not alter the length of sentences prescribed and since the decision of the court below has applicability to these present statutes, they have been designated as the statutes involved in this case.

writ of habeas corpus with the United States District Court for the Northern District of Ohio, Eastern Division. Said petition contended as one ground that appellee's combined sentence of thirty to sixty (30-60) years on conviction of possession for sale and sale of marijuana constituted cruel and unusual punishment.[2] On June 7, 1974, and upon the pleadings, the district court held as a matter of law that appellee's sentence was not in violation of the Eighth and Fourteenth Amendments. (Appendix page 8).

Appellee then appealed to the court below. On July 3, 1975, after briefing and oral argument, that court, by two to one (2-1) decision, reversed the judgment of the district court. In so holding, the court below specifically stated its conclusion that an attack on a sentence was also an attack on the constitutionality of the underlying substantive statutes. Since the court below found the sentence to be disproportionate, therefore, they remanded the matter to the district court with instructions to issue the writ of habeas corpus. Appellant, thereafter, timely filed his notice of appeal, thereby preserving the issues herein. On July 23, 1975, the court below granted appellant's previously filed motion for stay of execution.

STATEMENT IN SUPPORT OF DOCKETING THE APPEAL

Appellants say that a substantial constitutional question is presented by this appeal which merits briefing and oral argument:

[2] Appellee was indicted on two separate occasions, each being two count indictments for possession for sale and sale of marijuana. After consolidation for trial and conviction on all counts, appellee was sentenced to ten to twenty (10-20) years concurrently on each count for possession for sale of marijuana and twenty to forty (20-40) years concurrently for each count of sale of marijuana, the latter sentences being consecutive to the former. This resulted in the aggregate term above.

> What are the confines and limitations of the Eighth Amendment prohibition on cruel and unusual punishment as applied to the duration of a sentence within the limits prescribed by a state legislature?

To be sure, this Court on several occasions has discussed the scope of the Eighth Amendment in various contexts. *Furman v. Georgia,* 408 U.S. 238 (1972); *Trop v. Dulles,* 356 U.S. 86 (1958); *United States v. Weems,* 217 U.S. 349 (1910). Moreover, while it is clear from those cases that the Eighth Amendment is both an evolving concept and demands that all punishments be proportionate to the offense for which they are administered, the fact remains that in no situation has this Court ever held a sentence to be cruel and unusual punishment based solely on the duration of imprisonment. *Gore v. United States,* 357 U.S. 386 (1958); *Blockburger v. United States,* 284 U.S. 299 (1932). In fact on the one occasion, cited by the court below, in which this Court has considered duration of confinement in an Eighth Amendment context, (ten years imprisonment for the offense of conspiracy to defraud), this Court stated:

> "If the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned."

Howard v. Fleming, 191 U.S. 121, 136 (1903). Moreover, the absence of any such case has not been due to previous lack of opportunity. In *Delp v. Ohio,* ___ U.S., ___, 95 St. Ct. 1675 (1975), the petitioner herein sought to raise on certiorari the same question before this Court as was raised by appellee in the court below. See also: *Rener v. Beto,* 447 F. 2d 20 (5th Cir., 1971), *cert. denied,* 405 U.S. 1051 (1972); *United States v. Coduto,* 284 F. 2d 464 (7th Cir., 1960), *cert. denied,* 365 U.S. 881 (1961), *rehearing denied,* 366 U.S. 947; *Black v. United States,* 269 F. 2d 38

(9th Cir., 1959), *cert. denied*, 361 U.S. 938 (1960); *Daut v. United States*, 405 F. 2d 312 (9th Cir., 1968), *cert. denied*, 402 U.S. 945 (1971); *United States v. Drotar*, 416 F. 2d 914 (5th Cir., 1969), *vacated on other grounds*, 402 U.S. 939 (1971); *United States v. Avey*, 428 F. 2d 1159 (9th Cir., 1970), *cert. denied*, 400 U.S. 93; *United States v. Sherman*, 430 F. 2d 1402 (9th Cir., 1970), *cert. denied*, 401 U.S. 908, *rehearing denied*, 401 U.S. 1015 (1971); *People v. Gonzales*, 25 Ill. 2d 235 (1962), *cert. denied*, 372 U.S. 923 (1963). Since the issue of cruel and unusual punishment as applied to duration of confinement only, is therefore squarely presented in this case, and since it appears from the cases above that the decision of the court below is novel, this case affords the opportunity to further define the parameters of the Eighth Amendment.

In briefing and oral argument, appellant would stress, as above, the conflict of this case with prior case law of cruel and unusual punishment. In fact, appellant is unable to find even one case from this Court or from any federal judicial circuit in line with the decision of the court below. In addition, appellant would stress that the decision of the court below, which voids the convictions of approximately 205 persons convicted and sentenced under the statutes held invalid, is contra the authority of the Ohio Supreme Court in *State v. Chaffin*, 30 Ohio St. 2d 13 (1972); contra the judgment of the Ohio legislature, which in 1970, after review of the marijuana laws, specifically retained the penalties involved in this case; and contra the decision of every lower federal court decision within the Sixth Circuit prior to the decision below. Finally, appellants would explore the current medical uncertainty as to the effects of marijuana, the nature of the offense in this case, as it relates to

impact on society, the impact of this decision on our system of jurisprudence, including discussions of federal state comity and theories of deterrence, and the applicability of the criteria utilized by the court below. By discussing these areas, appellant would show that the wholesale impact of the decision of the court below and the resulting chaos to the administration of criminal justice in Ohio, as relates to both persons already incarcerated pursuant to the statutes held invalid and those currently facing trial, conviction, and sentence under them, is unjustified. As such, appellant respectfully requests docketing of this appeal.

CONCLUSION

WHEREFORE, for all the above reasons that a substantial question exists which requires resolution, appellant requests that this case be heard.

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THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C73-1043

EDWARD L. DOWNEY, #132-367,
Petitioner,

v.

E. P. PERINI,
Respondent.

ORDER

KRUPANSKY, J.

This is a proceeding upon a Petition for Writ of Habeas Corpus. A return of the Writ has been filed by respondent, and a traverse to the return has been submitted by petitioner. The Court is satisfied that the petitioner has exhausted available State remedies in compliance with 28 U.S.C. §2254.

Petitioner was indicted in the September, 1969 term of the Cuyahoga County Grand Jury for possession for sale of a narcotic drug, sale of a narcotic drug, and possession of a narcotic drug for each of two separate incidents. Both cases were consolidated for trial.

Petitioner was convicted of two counts of possession for sale of a narcotic drug and two counts of sale of a narcotic drug, cannabis. Petitioner is presently in the custody of respondent, Superintendent of the Marion Correctional Institution.

Petitioner seeks by writ of habeas corpus to set aside his 30 to 60 year sentence for the possession and sale of marijuana. Petitioner challenges his sentence as excessive and therefore a cruel and unusual punishment under the Eighth Amendment as made applicable to the

states by the Fourteenth Amendment. *Robinson v. California,* 370 U.S. 660 (1962), *reh. denied,* 371 U.S. 905 (1962).

Petitioner was convicted of two counts of possession for sale of a narcotic drug, and two counts of sale of a narcotic drug. The trial court imposed concurrent ten to twenty year sentences for the possession for sale convictions, and concurrent twenty to forty year sentences for the sale convictions, and ordered the sentences served consecutively.

Petitioner alleges that a 30 to 60 year sentence for the sale of a small quantity of marijuana is so greatly disproportionate to the gravity of the offense, and so exceeds the bounds of any legitimate legal purpose, that it constitutes a cruel and unusual punishment within the meaning of the Eighth Amendment. Apparent from counsels' briefs, the issue before the Court is one of law, and no hearing is required.

The Supreme Court of the United States has dealt several times with the Eighth Amendment. The length of imprisonment has never been an issue, however, and the Court has denied certioari to several cases where that issue was raised. *Rener v. Beto,* 477 F. 2d 20 (5th Cir. 1971), *cert. denied,* 405 U.S 1051 (1971), *United States v. Cudato,* 284 F. 2d 464 (7th Cir. 1960) *cert. denied,* 365 U.S. 881 (1960) *reh. denied,* 366 U.S. 947 (1961).

In *Weems v. United States,* 217 U.S. 349 (1909) the Court stated that "it is a precept of justice that punishment for the crime should be graduated and proportioned to the offense." 217 U.S. at 367. *Weems* adopted a progressive theory concerning the meaning of the cruel and unusual punishment clause. That theory proposes that

the meaning of the clause changes with the passage of time and changing community standards. But *Weems* involved a Philippine law prescribing the punishment of *cadena temporal* for falsifying a public and official document. *Cadena temporal* prescribed deprivation during imprisonment of civil rights and the perpetual absolute disqualification to enjoy political rights, hold offices etc. and surveillance by the authorities for life.

Trop v. Dulles, 356 U.S. 86 (1958) also concerned an unusual and additional punishment. The case involved a section of the Nationality Act of 1940 which provided for loss of "nationality" by any person deserting the military or naval forces of the United States in time of war, provided he was convicted thereof by court martial and as a result of such conviction was dismissed or dishonorably discharged from the service. The Court in both *Weems* and *Trop* found these punishments excessive and cruel because they were imposed in addition to traditional and adequate forms of penalty.

In considering the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972) only two of the majority justices found it to be cruel and unusual per se. The other majority justices predicated their holding on the arbitrary manner of imposition of this penalty, which is not in issue herein.

The federal courts have, by the weight of authority refused to interfere with a prison sentence which is within the limits imposed by statute. Indeed, similar sentences such as found in this case have been held not to violate the Eighth Amendment in various federal circuit courts of appeal. *See*, *Rever v. Beto*, 477 F. 2d 20 (5th Cir. 1971), *cert. denied*, 405 U.S. 1051 (1972), 30-year sentence for second offense of possessing marijuana not cruel and unusual if within statutory limits; *Anthony*

v. United States, 331 F. 2d 687 (9th Cir. 1964), 40-year sentence imposed for two sales on two different days and circumstances, wherein the court cited *Gurera v. United States*, 40 F. 2d 388 (8th Cir. 1930) holding that an ". . . [A]ppellate court has no control over a sentence which is within the limits allowed by a statute."; *United States v. Cudato*, 284 F. 2d 464 (7th Cir. 1960) *cert. denied*, 365 U.S. 881 (1960) *reh. denied*, 366 U.S. 947 (1960), 40 years for five counts of unlawful sale of marijuana; *Smith v. United States*, 273 F. 2d 462 (10th Cir. 1959) 52-year sentence for 14 counts of sale of marijuana, wherein the majority held that appellate courts are without power to control or modify a sentence which is within the limits fixed by a valid statute.

In support of his contention, petitioner directs the Court's attention to numerous studies concerning the effects of marijuana. The Court feels, however, that the use of marijuana is a particularly fit subject for legislative consideration. One Department of Health, Education and Welfare official called the subject of marijuana use the "clinical version of should we stay in or get out of Vietnam". Newsweek, July 24, 1967, p. 46. Authorities are unsure of the physical and psychological effects of marijuana use, but it is clearly a fallacy to suggest that the existence of one evil such as alcohol or tobacco should excuse or encourage the establishment of another.

Lately, numerous articles have appeared indicating research has uncovered serious health hazards with the use of marijuana. *See*, Haas, Sunday, The Plain Dealer Magazine, April 28, 1974.

Researchers at Columbia Presbyterian Medical Center have found cellular damage, damage to the genetic material DNA, lung damage, brain damage, and psycho-

logical damage including psychological addiction. Nahas, Marijuana — Deceptive Weed, Columbia University Press, 1974.

This is an area well-suited for judicial obstention while the controversy rages.

Applying the foregoing authorities to the present case, the Court finds that petitioner's sentence does not violate the cruel and unusual punishment prohibition set forth in the Eighth Amendment. Accordingly, the relief requested in the Petition is denied.

IT IS SO ORDERED.

ROBERT B. KRUPANSKY,
United States District Judge

No. 74-1929

UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

Appeal from the United States District Court for the Northern District of Ohio.

EDWARD L. DOWNEY,
Petitioner-Appellant,

v.

E. P. PERINI, Superintendent,
Respondent-Appellee.

Decided and Filed July 3, 1975.

Before: PHILLIPS, Chief Judge, PECK and LIVELY, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which PHILLIPS, Chief Judge, joined. PECK, Circuit Judge (p. 7) filed a separate dissenting opinion.

LIVELY, Circuit Judge. This case concerns the Eighth Amendment prohibition against cruel and unusual punishment. Petitioner was found guilty by a jury in the Court of Common Pleas of Cuyahoga County, Ohio of violating Ohio Revised Code (ORC) §3719.20 (A), possession of marijuana for sale, and ORC §3719.20 (B), sale of marijuana. This was petitioner's first drug-related offense, and the amounts of marijuana involved were very small. Petitioner received indeterminate sentences which embodied the statutory minimum and maximum provided for each violation: 10 to 20 years imprisonment for possession for sale and 20 to 40 years for sale. It was ordered that the sentences run consecutively, resulting in a total sentence of 30 to 60 years for the two offenses.

On direct appeal to the Ohio Court of Appeals one of

the issues raised by Downey was that his sentence constituted cruel and unusual punishment in violation of the Constitutions of the United States and Ohio. The court of appeals affirmed his conviction and sentence, relying on the decision of the Supreme Court of Ohio in *State v. Chaffin*, 30 Ohio St. 2d 13 (1972). Petitioner then attempted to appeal to the Supreme Court of Ohio, assigning as error the same claims which he had made in the court of appeals. The motion for appeal was denied and Downey did not seek review by the Supreme Court of the United States. This appeal results from the dismissal by the district court of his petition for a writ of habeas corpus.

It is clear that the words "cruel and unusual punishment" do not have a rigid and immutable meaning. Though this particular provision of the Bill of Rights has not been considered by the courts as often as some others, a survey of the Supreme Court opinions dealing with it reveals an evolving concept. While the authors of the Amendment may well have been primarily concerned with certain barbaric forms of punishment used in England and Europe prior to our independence,[1] it has long been settled that all punishments are subject to the requirement that they be proportionate to the offense for which they are administered. *See United States v. Weems*, 217 U.S. 349, 367-68 (1910); *compare* dissenting opinion of Mr. Justice Field in *O'Neill v. Vermont*, 144 U.S. 323, 339 (1892). The Court in *Weems* was primarily concerned with the kind of punishment inflicted; nevertheless, the requirement that the punishment not be disproportionate applies to the length of sentence as well. *See, e.g.*, 217 U.S. at 368-71.

[1] *See* Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 Calif. L. Rev. 839, 860-865 (1969).

The Supreme Court has never held a sentence of imprisonment to constitute cruel and unusual punishment solely because of its length. However, in *Howard v. Fleming*, 191 U.S. 126 (1903), the Court did hear an Eighth Amendment challenge based on the length of sentence alone. The Court found that the ten-year sentence imposed in that case was not valid as cruel and unusual punishment after considering the appeal on its merits.

Some courts have held that length of sentence may not be the sole basis of a finding of cruel and unusual punishment. *See, e.g., Smith v. United States*, 273 F.2d 462, 467-68 (10th Cir. 1959) *cert. denied*, 363 U.S. 846 (1960); *Anthony v. United States*, 331 F.2d 687, 693-94 (9th Cir. 1964); *Rener v. Beto*, 447 F.2d 20, 23 (5th Cir. 1971) *cert. denied*, 405 U.S. 1051 (1972) However, in considering an Eighth Amendment challenge to a statute which provided a maximum of five years' imprisonment, this court in *Hemans v United States*, 163 F.2d 228, 237, *cert. denied*, 332 U.S. 801 (1947), stated:

> We need not pause long to reject the invalid argument of appellant that the federal statute which he violated inflicts cruel and unusual punishment in contravention of the Eighth Amendment to the Constitution of the United States. Historically viewed, the Eighth Amendment was adopted to prevent inhuman, barbarous, or torturous punishment, *though long-term imprisonment could be so disproportionate to the offense as to fall within the inhibition.* (Emphasis added.)

Thus we agree with the appellant that a sentence which is disproportionate to the crime for which it is administered may be held to violate the Eighth Amendment solely because of the length of imprisonment imposed.

A court is not free to apply purely subjective criteria to determine whether a particular sentence or statutory range of sentences offends the Constitution. The Supreme Court, in *Weems, supra,* suggested an objective standard of comparing the particular punishment under review with those provided for other crimes by the same jurisdiction, and those provided for the same offense by other jurisdictions. 217 U.S. at 380-81. Though *Furman v Georgia*, 408 U.S. 238 (1972), was concerned with kind as opposed to length of punishment, the opinions of the Court in that case are instructive in the present inquiry. The majority of the Court relied heavily on comparisons of sentences for other crimes and those permitted in other jurisdictions, and other statistical data, in determining that the death penalty as administered constituted cruel and unusual punishment. The evolving nature of the concept was recognized in references to the need to conform punishments to the conscience of contemporary society. *See, e.g.*, opinion of Mr. Justice Marshall, 408 U.S. at 329. Mr. Justice Brennan found a common thread in previous Supreme Court decisions holding particular punishments to be cruel and unusual in that each was "degrading to human dignity," a concept first applied in an Eighth Amendment setting in *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Finally, the opinion of Mr. Justice Brennan set forth this test:

> The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.
> 408 U.S. at 282.

We look to the minimum sentences provided by each of the statutes — 10 years under ORC §3719.20(A) for possession for sale and 20 years under ORC §3719.20(B) for sale — not the total sentence which resulted from the discretionary act of the trial judge in ordering that the two sentences be served consecutively. In some cases sentences under admittedly constitutional statutes have been held to constitute cruel and unusual punishment as applied to particular facts. *E.g., Hart v. Coiner*, 483 F.2d 136 (4th Cir.), *cert. denied*, 415 U.S. 938, 983 (1973). However, when a sentence is within the statutory limits and it is argued that the statute provides for punishment that violates the Eighth Amendment, this is an attack on the constitutionality of the statute itself. *United States v. Dawson*, 400 F.2d 194, 200 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). In *Weems* the Supreme Court said, "Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned." 217 U.S. at 366.

It appears from addenda to appellant's brief that Ohio's 20-year minimum penalty upon conviction for sale of marijuana is the most severe punishment for this offense imposed by any state. One other state provides a 10-year minimum, five have a minimum of 5 years and 23 states have minimum fines with no minimum imprisonment. Of the states which provide separate penalties for sale and possession for sale, Ohio's ten-year minimum for possession for sale far exceeds that of any other state with a minimum imprisonment requirement. Most states have no minimum sentence of incarceration for possession for sale.

Comparison of the Ohio marijuana penalties with those provided for various other crimes under Ohio law is also revealing. The Ohio legislature has drastically reduced the penalties for nearly all criminal violations in recent

years.[2] The Revised Criminal Code of Ohio provides that the minimum sentence for crimes classified as first degree felonies shall be 4 to 7 years.[3] Thus for the crime of kidnaping,[4] formerly carrying a sentence of 20 years to life, the minimum is 4 to 7 years. Many other violent crimes, such as armed robbery[5] and burglary,[6] rape[7] and voluntary manslaughter[8] are punishable by the same minimum sentence, 4 to 7 years. The crime of assault with a deadly weapon, even when serious physical harm results, is classified as a second degree felony[9] and thus carries a minimum sentence of only 2 to 5 years. In fact, murder and aggravated murder[10] and forcible rape of a person under 13 years of age[11] are the only offenses for which the Criminal Code prescribes a minimum penalty of more than 4 to 7 years.

This brief tabulation makes it clear that the minimum penalties required for conviction of violating ORC §3719.20 (A) and (B) far exceed those provided for other offenses, including crimes involving violence. We can discern no rational basis for imposing a minimum prison sentence of 10 years for possession for sale, or 20 years for sale of marijuana, while requiring much lower minimum sentences for the very serious offenses listed herein. Moreover, although it has reduced the penalty for simple possession of marijuana, unlike the other states Ohio has not revised its penalties for the marijuana-related offenses involved in this case in keeping with evolving

[2] The Act Revising the Criminal Code of Ohio, Amended Statute H.B. 511 (Eff. 1-1-74).
[3] ORC §2929.11(B)(1).
[4] ORC §2905.01(C).
[5] ORC §2911.01(B).
[6] ORC §2911.11(B).
[7] ORC §2907.02(B).
[8] ORC §2903.03(B).
[9] ORC §2903.11(B).
[10] ORC §§2903.02 and 2903.01.
[11] ORC §2907.02(B).

concepts of justice and penology. As a result of an amendment to the Ohio Revised Code, effective September 16, 1970, marijuana is no longer classified as a narcotic drug. It now falls within the definition of hallucinogens, ORC §3719.40, possession and sale of which is prohibited by §3719.44. The penalties for sale and possession for sale have not changed, however, because narcotic drugs and hallucinogens are penalized under the same sentencing statute, ORC §3719.99(D) and (F).

Upon consideration of the relevant factors we conclude that the sentence imposed on Downey, in response to the requirements of the Ohio statute, was excessive in length and disproportionate to the nature of the offenses for which he was convicted. The legitimate legislative purposes which have led the State of Ohio to treat possession for sale and sale of marijuana as criminal acts may be achieved without the imposition of penalties which are neither proportionate to the offenses nor in keeping with contemporary standards. *Furman v. Georgia, supra; Weems v. United States, supra.*

The judgment of the district court is reversed, and the cause is remanded with instructions that the writ of habeas corpus issue.

PECK, Circuit Judge, dissenting. I do not conceive that the framers of the Constitution contemplated, nor that the document enunciated, that punishment could be determined to be "cruel and unusual" on the basis of its duration alone, and on that ground respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1929

EDWARD L. DOWNEY,
Petitioner-Appellant,

v.

E. P. PERINI, Superintendent,
Respondent-Appellee.

RESPONDENT-APPELLEE E. P. PERINI'S NOTICE OF APPEAL

Notice is hereby given that respendent-appellee, E. P. Perini, Superintendent of the Marion Correctional Institute appeals to the Supreme Court of the United States from the order of this Court reversing the denial of petitioner-appellant, Edward L. Downey's, petition for writ of habeas corpus, entered on July 3, 1975. This appeal is taken pursuant to 28 U.S.C. §1254 (2).

Respectfully submitted,
WILLIAM J. BROWN,
Attorney General
/s/ LEO J. CONWAY,
Assistant Attorney General
Attorneys for Respondent-Appellee
E. P. PERINI

CERTIFICATE OF SERVICE

I, Leo J. Conway, one of the attorneys for the respondent-appellee, E. P. Perini, and a member of the Bar of the Supreme Court of the United States hereby certify that on July 11, 1975, I served a copy of the foregoing Notice of Appeal on petitioner-appellant, Edward L. Downey, through the office of his counsel, Mr. Ovid C. Lewis, School of Law, Case Western Reserve University, Cleveland, Ohio 44106, via the United States mail service.

This constitutes service on all persons required to be so served.

/s/ LEO J. CONWAY,
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